

ILLINOIS POLLUTION CONTROL BOARD
October 17, 1996

R.P. LUMBER COMPANY, INC.,)	
)	
Petitioner,)	
)	PCB 94-184
v.)	(UST - Fund)
)	
OFFICE OF THE STATE FIRE)	
MARSHAL,)	
)	
Respondent.)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a petition for review filed by R.P. Lumber Company, Inc. (R.P. Lumber) seeking review of a final deductibility determination issued by the Office of the State Fire Marshall (OSFM). The OSFM determined that a \$100,000 deductible applied to R.P. Lumber regarding its leaking underground storage tank (UST).

On July 7, 1995 the Board entered an order in this matter denying partial summary judgment to R.P. Lumber Company. At the request of R.P. Lumber, this matter was subsequently stayed pending the decision of the appellate court in Stroh Oil Company v. Office of the State Fire Marshall and the Illinois Pollution Control Board 281 Ill. App.3d 121, 665 N.E.2d 540, 216 Ill. Dec. 480 (4th Dist. May 9, 1996).

The Board now has before it the following outstanding motions: Petitioner's Request for Entry of Final Order, Motion to Supplement the Record and Supplemental Motion for Summary Judgment filed September 3, 1996; Respondent's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment filed September 3, 1996; Complainant's Response to Petitioner's Supplemental Motion for Summary Judgment filed September 12, 1996; and Petitioner's Response to Respondent's Motion for Summary Judgment filed September 12, 1996.

The Board grants R.P. Lumber's Motion to Supplement the Record and R.P. Lumber's Request for Entry of Final Order.

As regards the motions for summary judgment, summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.) For reasons more fully explained below we find no genuine issues of material fact to exist or remain in dispute between the parties and we grant the Office of the State Fire Marshal's Motion for Summary Judgment.

For the same reasons, the Board denies R.P. Lumber's Supplemental Motion for Summary Judgment.

Reconsideration of Prior Order

R.P. Lumber requests that the Board reconsider its July 7, 1995 decision affirming the OSFM deductible determination of \$100,000, based upon the Board's recent decision in Color Communications, Inc. v. IEPA (July 18, 1996) PCB 96-125.

At issue in Color Communications was whether one applicant's two separate Clean Air Act Permit Program (CAAPP) applications for its two sources in Chicago was correct under the Act's provisions pertaining to the CAAPP. The Board held that these two facilities were properly treated as one source for the purposes of CAAPP permitting. Having found that a support relationship existed between the two facilities, and that the facilities were adjacent, the Board concluded that the Agency properly determined that the facilities should be considered one source for purposes of CAAPP permitting. R.P. Lumber argues by analogy that if two facilities located a city block apart can be considered a single facility under the Act (Color Communications), then so should the instant two underground storage tanks (UST) be considered a single "site".¹

The Board's decision in Color Communications, an air permit appeal, is easily distinguished. That decision was premised upon Section 39.5 of the Act, entitled the Clean Air Act Permit Program. Contained therein are several sections relevant to the definition of a CAAPP source. The Board's decision in this case is premised upon Title XVI: Petroleum UST and the definition of site contained therein. Color Communications cannot serve as precedent in this UST decision concerning the proper deductible.

An additional distinction is the issue of ownership and control. There was no question in Color Communications that the sources were under one common control. However in the case at hand, for purposes of Fund reimbursement (415 ILCS 5/57.9), R.P. Lumber attempts to rely upon a previously registered UST located on property which it did not even own. In fact R.P. Lumber is attempting to access the Fund for a spill which occurred in 1993 (IEMA incident number 92-3437)² based upon a registered tank located on property it did not purchase until 1994. One of the many other distinctions is that the CAAPP is a mandatory requirement under the Clean Air Act, while applicants may access the Fund if they choose and are eligible (415 ILCS 5/57.9).

The Board finds its recent ruling in Color Communications is not on point to the matter at hand and finds no reason to reverse its July 7, 1995 decision to deny R.P. Lumber summary judgment.

¹ For a further discussion of the USTs on site, as well as the chronological order of R.P. Lumber's purchase of the site, see the Board's July 7, 1995 order.

² See R.P. Lumber's May 1, 1995 motion for summary judgment at page 2.

Equal Protection

R.P. Lumber argues that the current statutory provisions outlining the state's deductible scheme bear no rational relationship to any legitimate governmental interest, and as such, deprived it of equal protection of the laws by arbitrarily denying it a monetary benefit in cleanup expenses which is provided to others in similar situations. R.P. Lumber relies upon the appellate court's recent ruling in Stroh Oil. (Stroh Oil Company, 281 Ill. App.3d 121, 665 N.E.2d 540, 216 Ill. Dec. 480 (4th Dist. May 9, 1996).)

R.P. Lumber is correct in that the Stroh Oil court did examine the constitutionality of the Underground Storage Tank Fund's (Fund) deductible classifications. However, the appellate court found those deductible classifications to be constitutional. (Id.)

In fact the Stroh Oil court performed an in-depth analysis of the constitutionality of the UST Fund classification scheme. Initially it noted that because the legislature has broad discretion in creating statutory classifications for the general welfare, such statutes have a presumption of validity. Because no fundamental right or suspect class is involved, the rational basis test applies when testing the constitutionality of this legislation. (Id. citing Harris v. Manor Healthcare Corp., 111 Ill. 2d 350, 371, 489 N.E.2d 1374, 1383 (1986).)

The Stroh Oil court squarely addressed the issue: "are the different deductible levels rationally related to a legitimate state interest?". The court found that "[t]he State has a legitimate interest in determining the population of USTs within its borders through the registration process, and establishment of a deductible scheme which encourages registration is certainly a rational approach toward attaining this end". (Stroh Oil, 281 Ill. App. 3d 129.)

Following Stroh Oil, the Board agrees that the Fund deductible scheme is rationally related to a legitimate state interest, and as such is not unconstitutional, and does not deprive an applicant of equal protection of the law. Accordingly R.P. Lumber's argument based upon the unconstitutionality of the state's deductible scheme is without merit.

The Stroh Oil court also noted that "[c]ourts will give less deference to classifications based upon status than to classifications based upon activity". (Stroh Oil citing Kickapoo Investment, Inc. v. Hartigan, 153 Ill. App.3d 785, 787, 506 N.E. 2d 365, 366 (1987).) Within the Fund deductible scheme, the Act encourages entities to register to be eligible for a lower deductible, regardless of status. Therefore, this Fund deductibility scheme is based upon an express activity and as such must be given deference.

Lastly, R.P. Lumber argues that the July 28, 1989 date for imposition of higher deductibles was arbitrary because there was no "lead-in" period to avoid higher deductibles. (415 ILCS 5/57.9(b).) The Stroh Oil court examined this same issue and determined that the applicant was in statutory noncompliance for over two years prior to the introduction of the deductible scheme; and as such knew, or should have known that it was subject to statutory penalties for failing to register its USTs. R.P. Lumber argues that the determinative factors in Stroh Oil are not present in its situation because it did not purchase the land until September

1986, “two months after the cut off date for deductible purposes”; and it had no knowledge of the existence of the pertinent UST until it unearthed the UST in 1991³.

The Board is not persuaded by R.P. Lumber’s arguments. R.P. Lumber states that it did not purchase the parcel in question until September 1986, “two months after the cut-off date for deductible purposes”. While it is true that UST registration obligations have existed under both state and federal law since at least 1986 (Stroh Oil citing PA 84-1072, Section 1, eff. July 1, 1986 (1985 Ill. Laws 7096, 7098); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, Section 601, 98 Stat. 3221, 3278 (1984)), the applicable cut-off date for eligibility to the Fund at issue here, found at Section 57.9(b) of the Act, concerns USTs registered prior to July 28, 1989. (415 ILCS 5/57.9(b) (1994).) R.P. Lumber owned the property in question since September 1986, almost three years before the actual cut-off date to register the UST for Fund eligibility under Section 57.9(b).

The Board hereby denies R.P. Lumber’s Supplemental Motion for Summary Judgment. The Board hereby grants the Office of the State Fire Marshal’s Motion for Summary Judgment and accordingly affirms the Office of the State Fire Marshall’s final deductibility amount of \$100,000.

Inasmuch as R.P. Lumber has withdrawn its claims with respect to compliance with the Illinois Forms Management Program Act, there are no further issues remaining in this proceeding, and the Board hereby accordingly closes this docket.

IT IS SO ORDERED.

Chairman C.A. Manning and Board Member K. Hennessey abstained.

Board Member M. McFawn concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of

_____.

³ The Board notes that although R.P. Lumber’s September 3, 1996 motion at page 4 states it discovered the UST in 1981, all other filings indicate this is a mistake and the date should be 1991.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board